87-2019

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

KAREN PINEMAN, ALPHONSE MAROTTA, DANIEL CLIFFORD, JUDITH NARUS, ROSE SCHEWE and ALFRED K. TYLL,
Petitioners,

v.

WILLIAM J. FALLON, Chairman of the State Employees Retirement Commission, HENRY E. PARKER, Treasurer of the State of Connecticut, and J. EDWARD CALDWELL, Comptroller of the State of Connecticut,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL W. ORTH
SHIPMAN & GOODWIN
799 Main Street
Hartford, CT 06103
(203) 549-4770

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. Did the Connecticut State Employees Retirement Act (SERA) and post-enactment conduct by the State create contractual obligations under the Contract Clause obliging Connecticut to maintain pre-1975 minimum retirement ages for unretired state employees who were employed prior to the 1975 amendment which raised the minimum retirement age by five years?

2. Were the petitioners' property rights in their pensions taken without just compensation in violation of the Due Process Clause of the Fifth and Fourteenth Amendments by amendments to SERA which retroactively raised the minimum retirement ages for unretired state employees?

3. Did the courts below apply an inappropriate standard of review to petitioners' due process claims?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Karen Pineman, Alphonse Marotta, Daniel Clifford, Judith Narus, Rose Schewe and Alfred K. Tyll, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 10, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Prior pertinent opinions in chronological order are reported under the name of *Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980); 637 F.2d 601 (2d Cir. 1981); 195 Conn. 405, 488 A.2d 803 (1985); and *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) and are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 10, 1988, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> No State shall . . . pass any . . . law impairing the obligation of contracts . . . . U.S. CONST. Art. I. § 10 c. 1.

> . . . nor shall private property be taken for public use, without just compensation. U.S. CONST. AMEND V.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . U.S. CONST. AMEND XIV.

The Connecticut State Employees Retirement Act, Conn. Gen. Stat. § 5-152 *et seq.* (SERA) is with the 1975 revisions (1975 Act) set forth in pertinent aspects in the Appendix.

STATEMENT OF THE CASE

From its passage in 1939 until 1974, the Connecticut State Employees Retirement Act, Conn. Gen. Stat. § 5-152 *et seq.* (SERA), provided that an employee's eligibility for pension benefits varied according to gender: women with 25 years of service were eligible for retirement with full benefits at age 50, while men with the same length of service became eligible at age 55. Conn. Gen. Stat. § 5-162(c)(1) (amended 1975). For employees with 10 to 25 years of service, the eligibility age for retirement with full benefits was 55 for women and 60 for men. Conn. Gen. Stat. § 5-162(d)(1) (amended 1975). Similar five-year eligibility differences, based on gender, existed for reduced pension benefits, which were available under certain circumstances, Conn. Gen. Stat. §§ 5-163(c) and 5-166(a) (amended 1975), and the tables by which benefits were calculated ensured that a female retiree received benefits equal to those received by a male retiree five years her senior. Conn Gen. Stat. § 5-162(d)(3) (amended 1975).

State employees, with few exceptions, were required to participate in and contribute to the system. Conn. Gen. Stat. § 5-160. Employees with less than ten years of service could withdraw their contributions to the plan upon leaving state employment. Conn. Gen. Stat. § 5-166. Employees with more than ten years of service had "vested" rights in the retirement plan which they did not lose even if they terminated their employment with the state. Conn. Gen. Stat. § 5-166.

In 1974, the United States District Court for the District of Connecticut found that the five-year retirement age differentials between male and female employees discriminated against men in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *Fitzpatrick v. Bitzer,* 390 F. Supp. 278 (D. Conn. 1974); *aff'd in part and rev'd in part on other grounds,* 519 F.2d 559 (2d Cir. 1975); *aff'd in part and rev'd in part on other grounds,* 427 U.S. 445 (1976). Connecticut did not appeal the *Fitzpatrick* ruling and began to administer its retirement plan in conformity with the court's decision so that

men were able to retire at the lower ages previously applicable only to women. *Pineman v. Oeschlin,* 494 F. Supp. 525, 530–531 (D. Conn. 1980). In 1975, at the next legislative session, the State legislature amended the retirement statute, by raising the retirement eligibility ages for female employees by five years so that they equaled the higher retirement ages which had been in effect for male employees prior to *Fitzpatrick.* P.A. No. 75-531 (1975) ("1975 Act"). A small number of employees who were close to retirement were permitted to retire pursuant to the terms of the prior act. P.A. No. 75-531 § 5.

The petitioners, who represent various classes of state employees, brought this action challenging the constitutionality of the 1975 Act claiming that it violates the Contract Clause by impairing Connecticut's contractual obligations to provide them with benefits at the retirement ages previously established. In addition, petitioners claimed that the 1975 Act effected a taking of their property rights without just compensation and without due process of law.

The facts relating to the retirement system were not in dispute and petitioners moved for summary judgment on the Contract Clause issue. The District Court, Jose A. Cabranes, J., granted the petitioners' motion for summary judgment, holding that the 1975 Act, as applied to the petitioners, violated the Contract Clause. *Pineman v. Oechslin,* 494 F. Supp. 525 (D. Conn. 1980) ("*Pineman* I"). In a lengthy and careful opinion, Judge Cabranes conformed to the analysis in recent contract clause cases such as *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), and *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). He gave consideration and weight to relevant state law, under *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938), and, while recognizing that he was not bound by Connecticut's law of contracts, found that under the state's common law, Connecticut had contractual obligations to its employees.

The respondents appealed the decision to the United States Court of Appeals for the Second Circuit, which concluded that the federal courts should abstain from deciding whether SERA was part of the state employees' contract of employment in the absence of any state court decisions addressing this issue, and therefore vacated the judgment and remanded the suit. *Pineman v. Oechslin*, 637 F.2d 601 (2d Cir. 1981) ("*Pineman* II"). Following the procedure established in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court of Appeals directed that the district court retain jurisdiction pending the state court determination of the state law question.

The petitioners filed a complaint in Connecticut Superior Court on August 25, 1981, and, invoking the *England* doctrine, reserved their right to return to the District Court. On May 4, 1984, the Superior Court ruled that no contractual obligation was created by SERA. That decision was affirmed by the Connecticut Supreme Court in a ruling on March 12, 1985. *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985) ("*Pineman* III"). The court ruled that in the absence of an express statement by the legislature "in clear and unambiguous terms" that it was creating a contract, no contractual rights could be found to exist. *Id.* at 415. The court said that the petitioners had property interests, but declined to rule on the due process issue.

The petitioners returned to the District Court and after preliminary rulings (including "*Pineman* IV" not in issue), the parties filed cross motions for summary judgment. The petitioners here summarize uncontroverted material which was set forth at much more length in the joint appendix in the court below.

Retirement benefits have generally been brought to the attention of state employees by the state around the time of hiring. This has been accomplished orally and by means of written material and pamphlets. A 37-page blue pamphlet dated January 1972 was printed in large quantity and ordered

distributed to employees at the time of hiring. The booklet stated, "You may retire — and receive immediate retirement benefits — at any time after you reach the minimum permissible retirement age . . . 50 for women . . ." (Ex. C-1 contained in the Joint Appendix to the Second Circuit at 170a). Many prospective employees inquired about the retirement system and its benefits. Some employees changed from other more lucrative employment due to superior state retirement benefits. The retirement benefits provided prior to the 1975 amendments, including the minimum retirement ages, were substantial factors in an employee's planning and provisions for his or her future and that of his or her spouse. The retirement system was a substantial inducement to persons to enter and to remain in state employment. For several years prior to the *Fitzpatrick* decision in 1974, an indeterminate number of male employees believed they would obtain, through legislative or judicial action, equal treatment with women under the retirement laws. From the date of that decision to June 1975, prospective and existing male employees were informed by the state, or learned, that their retirement ages and benefits had become the same as those of women. (Revised Request for Admissions contained in the Joint Appendix to the Second Circuit at 139a. See also the 1961 pamphlet, contained in the Joint Appendix to the Second Circuit at 179a).

In 1971, SERA was amended to provide for the sound funding of the retirement system on an actuarial reserve basis. Conn. Gen. Stat. § 5-156(a). The State's actuary indicated that this legislative mandate was being carried out as of December, 1975 (Ex. 39).

The 1975 Act contained no "compensating" benefits to existing employees for the major detrimental modifications it made. It was not preceded by any legislative finding that the retirement fund or the state treasury was fiscally unsound, nor did the defendants produce any evidence indicating such fiscal jeopardy. Estimated initial annual cost savings of 3 to 5 million dollars were miniscule portions of the state budget. Moreover, it was clear that this reduction was not necessitated

by a fiscal crisis or other specified need for the sums, as the remarks in the legislature indicate that "this House will be able to find a place to use [these funds]." (Joint Appendix to to the Second Circuit at 8a, 30a).

On these facts, Judge Cabranes granted respondent's cross-motion for summary judgment, accepting the state court's opinion that SERA did not create any contract rights and also ruling that the 1975 Act did not deny the petitioners due process because their property interests were modified by the legislature for the reason of "fiscal relief" (a claim which he had rejected in *Pineman* I as insufficient under a Contract Clause analysis). *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) ("*Pineman* V"). The United States Court of Appeals for the Second Circuit affirmed ("*Pineman* VI").

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS MISAPPLIED THE DECISIONS OF THIS COURT.

(a) An Express Limitation On The Right To Repeal Legislation Is Not Required In Order To Find That A State Has Entered Into A Contract.

In holding that summary judgment for respondents was appropriate, the Second Circuit gave undue deference to the Connecticut Supreme Court's ruling that SERA created no contractual obligations. The Connecticut Supreme Court erroneously held that a state could never be found to have created an implied contract, ruling that government-fostered expectations do not result in a contractual obligation unless the legislature, in clear and unambiguous terms, expressly surrendered its power of amendment and revision. *Pineman* III, *supra*, 195 Conn. at 415-416.

Thus, both the Connecticut Supreme Court and the Second Circuit ignored the undisputed facts that the minimum retirement ages had remained unchanged since the inception of the Act in 1939 and that Connecticut had induced persons to seek and remain in state employment by advertising the state's retirement benefits. Petitioners have substantially performed their end of the bargain in reliance upon beliefs fostered by the state. To permit the state to now repudiate its representations "would perpetrate a considerable injustice." *United States v. Larionoff*, 431 U.S. 864, 876 n. 19 (1977).

In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), this Court observed that:

> a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions with the protection of Article I § 10. . . . On such a question, one primarily of state law . . . we are bound to decide for ourselves whether a contract was made.

Accordingly, this Court rejected the opinion of the Indiana Supreme Court that Indiana had not created contractual obligations relating to teacher tenure decisions. *Id.*

In addition, legislation affecting the obligation of the state is subject to stricter scrutiny under the Contract Clause than laws merely affecting contracts between private parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978).

Petitioners, and *Pineman* I, relied heavily on the language and analysis giving meaning to the Contract Clause in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). *Allied* at 438 U.S. 241, 250 spoke against major, unforeseen and retroactive changes in pension funding, without moderation or

reason, in the spirit of oppression — much as here the legislative history of the 1975 Act demonstrates. (Joint Appendix to the Second Circuit at 8a, *Pineman* I). In *Fisk v. Police Jury of Jefferson,* 116 U.S. 131 (1885), this court recognized that contract clause protection must extend to implied contracts, particularly when action has been taken or substantial services have already been performed. *See also, United States v. Larionoff, supra,* 431 U.S. at 879.

The federal courts below acted in conflict with these precedents and gave undue deference to the state court opinion in *Pineman* III. The state court rejected petitioners' contract claims, but the contract approach does not "play havoc" with basic principles of contract law, let alone "traditional contract clause analysis." *Pineman* III also stretched mutual assent to cover modifications of *all* contractual relationships including unilateral and promissory estoppel ones, and disregarded a state's reserved powers which are a major underpinning ("necessary and reasonable") of the *United States Trust* analysis. Indeed, "reasonable modification" comports with heightened judicial scrutiny — yet here the actual modification was major, retroactive, unreasonable and unnecessary. *Pineman* III strays further from soundness in making a major distinction between public and private employment, equating that with express legislative intent, and forgetting that the contract clause applies to state legislation, not federal.

Moreover, since *Pineman* III, the Connecticut Supreme Court confirmed that an employer's representations, including those in its personnel manual, may, under appropriate circumstances, give rise to an express or implied contract, and that statements in the manual are of critical relevance to the existence of a contract. *Finley v. Aetna Life & Casualty Co.,* 202 Conn. 190, 520 A.2d 207 (1987). This holding should apply to public employees, because when states become employers they "are not acting as sovereignties . . . [but] come down to the level of ordinary individuals [and] [t]heir contracts have the same meaning as that of similar contracts between private persons." *United States Trust Co., supra,* 430 U.S. at 25

n. 23, quoting *Murray v. Charleston*, 96 U.S. 432 (1878). Thus, to the promissory underpinning of SERA would be added the plethora of post-enactment circumstances and representations in this case which would constitute a contract in the private sector and which, at the very least in the public sector, show a relationship *in the nature of a contract.* Here contractual elements abound: offer, acceptance, consideration in pension contributions from wages, consideration in continued service, not to mention reasonable expectations and reliance, all as "reinforced" by oral and handbook representations.

The 1939 SERA contains no reserved power to repeal, alter or amend as to existing employees, which would be inconsistent with a contract (yet still would not be conclusive) as in *National Railroad Passenger Corp. v. Atchinson, Topeka & Santa Fe Railroad Co.*, 470 U.S. 451, 465-67 (1985). This *"Amtrak"* decision points out the difficulty of finding contracts in schemes of public regulation, but should not be applied to permanent plans of deferred compensation affecting existing employees. Likewise, *United States v. Larionoff*, 431 U.S. 864 (1977) does not apply because it deals with federal employees, and because it actually condemns the taking away of a military enlistment bonus already earned.

Here, to give a specific example, petitioner Pineman, who entered state service in 1955 due in part to specific representations that she could retire with benefits at age 50, worked and contributed a portion of her pay for 20 years until she was "told" of a change by the 1975 Act. She will now have over 35 years of state service before she can retire with benefits at age 55. Unless relief is afforded her, she has to work and contribute for five more years — and if she dies just before reaching 55, she will get nothing back, not even her own contribution from wages.

(b) Petitioners' Property Interests In Their Retirement Funds Have Been Taken Without Compensation.

Petitioners' property interests in retirement funds and benefits have been taken without any compensation in violation of the due process clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. The three-factor analysis reiterated in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1980) should have been applied by the Second Circuit to invalidate the 1975 Act. In *Connolly*, there was no taking because fairness and justice did not require the public "to shoulder the responsibility of rescuing plans that are in financial trouble." Here, starting with the absence of financial trouble, the economic impact is entirely on petitioners due to a partial taking of up to five years or to a complete taking in the case of death during such time; there is a major interference with the receipt of deferred compensation including employees' own contributions, and the government acted hurriedly and without an adjustment of benefits and burdens. The public, not petitioners, should in fairness and justice, bear the additional financial burden imposed on the retirement fund due to a court ruling that discrimination against men existed on the very face of SERA due to the legislature's "fault." Contrary to the Second Circuit, grandfathering was not an adjustment for those not grandfathered; women were suddenly and severely affected by having to work five years longer to receive any pension benefits; there were no increased benefits whatsoever until an employee works and contributes for five years longer, and existing employees had every reasonable expectation that retirement ages would not be reduced.

Although property rights may be taken for a public purpose provided that just compensation is paid, petitioners are still waiting for some compensation — even for their own contributions.

(c) The Legislature Acted Arbitrarily In Retroactively Changing The Minimum Retirement Age.

The petitioners' property interests were impaired by a law, the 1975 Act, which was not rationally related to a legitimate state interest. The *Fitzpatrick* decision had already imposed equality by decreeing that men should receive the same treatment as women under SERA. The 1975 legislature thus did not need to enact equal treatment. Instead, it acted to "equalize upwards" retirement ages. The "fiscal reason" for the 1975 Act was decimated by the analysis in *Pineman* I; but, as later applied for due process purposes, it has been used to make arbitrary legislation virtually unreviewable. The result below is in sharp contrast to the serious fiscal drain as the social security trust fund which justified the exception to the five-year Social Security offset provisions upheld in *Heckler v. Mathews*, 465 U.S. 728 (1984).

The "fiscal reason" for the 1975 Act fails in several major respects: (a) the legislature had already acted in 1971 to fortify its commitment to its employees by mandating a plan of sound long-term financing. Conn. Gen. Stat. § 5-156(a) required future funding on an actuarial reserve basis over a period of time based on certifications, evaluations and appropriations: "The general assembly . . . shall appropriate to the retirement fund the amount . . ." annually certified by the retirement commission to comply with the statute. Progress towards sound financing was underway when *Fitzpatrick* was decided; (b) 1975 legislative history clearly reveals that the initial annual savings to the state were estimated at only three to five million dollars — or by one estimate 2.8 million as to existing employees. There were no claims or findings of imminent fiscal jeopardy to the retirement fund or to the state. Indeed, the remarks of the sponsor of the last-minute retroactive amendment which became part of the 1975 Act — that the "House will be able to find a place to use" those millions — and a Senator — that the state would be able to start realizing immediate savings on appropriations to the fund — demonstrate the absence of any crisis. Indeed

$3,000,000.00 represents only 3 percent of the $51,000,000.00 1975 cost of the fund to the State, and is less than $^{7}/_{10}$ths percent of the State's $1,700,000,000 budget; (c) The predictions of a New York City style bankruptcy were baseless and without any attempt at legislative findings — "in no sense like New York," per *Pineman* I.

Petitioners' characterizations of the 1975 Act which left the Second Circuit "unimpressed" are accurate and accord with *Pineman* I. What is unimpressive is what the Second Circuit presumed the legislature knew. High levels of inflation had not "hit" in 1975 and wages were not yet escalating. The legislature was not reacting to such fiscal considerations anyway, but rather to a federal court (which had remedied reverse sex discrimination) and to employee retirement at age 50 (which had been permitted by the legislature for women for decades). The legislature made no attempt beyond grandfathering to tailor, classify or give any compensatory benefits or adjustments of burdens. The 1975 Act represents the nadir of irrationality and oppression, especially as to long-term employees.

The justification of being able to spend the money elsewhere is reminiscent of Mr. Justice Blackman's observation that a "governmental entity can always find use for extra money," *United States Trust, supra*, 431 U.S. at 26. The Second Circuit, however, has placed the 1975 Act beyond review. If such an Act can be upheld under existing review standards, then it is time to consider a higher standard, at least regarding retirement benefits subjected to major impairment. Heightened scrutiny for state economic legislation is suggested in *"Amtrak", supra*, 470 U.S. at 472, footnote 25. Such important and long planned for benefits and systems should not be subject to fast and unfettered legislative whim. Changes in such benefits should be made in a studied, orderly, offsetting compensation manner. *Heckler v. Mathews*, 465 U.S. 728, 748 (1984), observed that "great nations, like great men, should keep their word," and at 751 acknowledged the "important governmental interest of protecting individuals

who planned their retirements in reasonable reliance" on provisions previously in effect.

(d) Importance Of Case And General Incorrectness Of Decision Below.

The class of petitioners in this action has been estimated to consist of up to 25,000 active employees in 1975. Many have had reasonable expectations about retirement dates and benefits shattered. Their morale and retirement planning have been impaired. The state's obvious interests in employees' morale, sound retirement planning and the use of the retirement system to recruit and retain loyal employees vital to the everyday functioning of the government have all been damaged. The vices of retroactive legislation which changes the rules for those already in service, especially those with vested benefits like the petitioners, are manifest.

The situation is likely to recur in those states which, like Connecticut, do not have constitutional or express statutory provisions which protect the retirement benefits of employees from substantial impairment. While a number of states also have case law (cited in *Pineman* I, II, and III) generally following a contractual analysis and balancing adverse changes with compensating benefits, in Connecticut, and potentially in other "unsettled" states, employees in the public sector are now unprotected from unstudied legislative hostility.

Retirement benefits are deferred compensation, a part of the hiring contract. They have been recognized as clearly earned, heavily relied upon, and thought of as property rights — vital to the independence and dignity of the individual. *Winston v. City of New York*, 759 F.2d 242, 247, 250 (2d Cir. 1985), quoting Reich, *The New Property*, 73 Yale L.J. 733, 769 (1964) after quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) on the creation of property interests. Now, in Connecticut, contract-type rights which would be protected for employees in the private sector, are not recognized under the

Contract Clause as obligations of the State itself. Moreover, public employees' property rights are subject to deprivation under the Due Process Clause, without legislative finding or real reason. The hint of fiscal crisis or unsoundness can now immunize any act a legislature may choose to pass — including a sweeping command to long-term employees to make additional contributions and to work five years longer before they can retire. And their property or contractually-based rights can be taken by the state without any "offsetting" compensation — even that portion of their benefits consisting of their own contributions — contributions which would be returned to them under SERA if they left state service with less than ten years of service.

In sum, in Connecticut and potentially in any state where the *Pineman* decisions could be applied, state employees cannot count on retirement benefits unimpaired by the legislature until they are eligible to retire, irrespective of representations and other inducements. That is wrong, and the constitutional issues and misapplication of precedents need settling by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

PAUL W. ORTH, ESQUIRE
SHIPMAN AND GOODWIN
799 Main Street
Hartford, CT 06103
(203) 549-4770
Counsel for Petitioners

June 8, 1988